IN THE

Supreme Court of the United States

October Term 1959

No. ~~607~~ 35

WATERMAN STEAMSHIP CORPORATION, *Petitioner*

v.

DUGAN & McNAMARA, INC., *Respondent*

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER STATEMENT OF THE CASE BY RESPONDENT

This is a brief in opposition to a Petition for Writ of Certiorari by the Waterman Steamship Corporation, hereinafter designated Petitioner, the original Defendant and Third Party Plaintiff, directed to the United States Court of Appeals for the Third Circuit which affirmed a final judgment entered by the United States District Court for the Eastern District of Pennsylvania, Clary, District Court Judge, in favor of Dugan & McNamara, Inc., Third Party Defendant, hereinafter designated Respondent. The judgment was entered pursuant to a motion for a directed verdict under F. R. C. P. 50.

The original Plaintiff, Jasper King, a longshoreman, sustained injuries when a vertical column of sugar bags about seven feet high collapsed while he and his fellow employees were discharging cargo aboard the *SS. Afoundria* while berthed in the Port of Philadelphia, Pennsylvania, U. S. A., on October 9, 1952. The sugar bags had been stowed in San Carlos, Negros Island, in the Philippines, by a stevedore of the ship, unrelated and unconnected in any way with the instant Respondent stevedore, about thirty-five days prior to the time the original Plaintiff, Jasper King, was injured. The bags, which contained raw sugar, were about three feet long and eighteen to twenty-four inches wide. When laid flat they were approximately fifteen inches thick. The bags were stowed parallel and ran athwartship.

In the original Complaint by Jasper King against the Petitioner, he alleged, inter alia, that his injuries were caused by the unseaworthiness of the *SS. Afoundria* and the negligence of her crew resulting from an unseaworthy or unstable stow which denied him a reasonably safe place in which to work. (App. 5a)

Specifically, it was alleged by Jasper King, longshoreman, original Plaintiff, that the Petitioner

> "allowed and permitted said cargo of sugar to be stowed in such a negligent and careless manner as to constitute a danger to plaintiff and other workmen unloading said cargo" and "failing to warn the plaintiff and other workmen of the dangerous and defective stowage of the cargo of sugar" and "permitting plaintiff and other workmen to commence unloading operations in a dangerous place of employment." (App. 5a)

The Petitioner, as Third Party Plaintiff, filed an Amended Third Party Complaint in which Petitioner alleged, inter alia,

> "While Jasper King and others were removing bags from a location about six feet aft of the forward

bulkhead, one or more bags fell from the top of one tier and struck Jasper King, causing the various severe personal injuries mentioned in the complaint. The only condition attributable to the vessel which could have been material in connection with this accident was the placing or shifting of a bag at or near the bottom of the exposed tier in such a position that the bags above it would not be firmly supported when reached by the longshoremen, which condition must have existed in order to produce the aforesaid accident under the circumstances disclosed by investigation. The said unstable, unsafe, and to that extent unseaworthy, condition of the stowed bags would not have resulted in the aforesaid accident except for the direct, primary and substantial negligence of the third-party defendant's employees in breaking down the stowed bags to an unsafe depth and thereby causing the tier to become exposed without safe, reasonable and adequate lateral support, which condition was or should have been known to third-party defendant, its representatives, supervisors, foremen and longshoremen." (App. 10a, 11a)

To the Amended Third Party Complaint the Respondent filed an Answer in which some of the averments of the Amended Third Party Complaint are admitted. It is specifically averred that the "manner and methods in which the bags were stowed caused the vessel to be unseaworthy and was the underlying cause of the accident." (App. 13a)

As a separate and distinct defense, the Respondent averred that it was, at the time of this accident, the employer of the original Plaintiff, Jasper King; that the accident which is the subject matter of the litigation occurred under circumstances making the Third-Party Defendant (Respondent) responsible to the original Plaintiff, Jasper King, for benefits under the Longshoremen's and Harbor Werkers' Act, as amended, 33 U. S. C. A. §901 et seq. Section 5 of said

Statute, 33 U. S. C. A. §905, provides that upon payment of compensation under the provisions of the said Statute the Respondent-stevedore, Third Party Defendant, was, and is, discharged of all liability to the Plaintiff or any other parties otherwise entitled to bring suit against Respondent-stevedore. The Respondent further specifically averred that the benefits under said Longshoremen's and Harbor Workers' Act were tendered to and accepted by the original Plaintiff, Jasper King. The Respondent claimed the said Statute was a complete defense under the circumstances to the Amended Third Party Complaint of the Petitioner (App. 14a).

The Respondent specifically averred that there was no contract between the Petitioner and Respondent (App. 14a). The Respondent further specifically pleaded as a defense that the Petitioner failed to state any ground for relief and failed to set forth any cause of action against the Respondent upon which relief could be granted (App. 15a).

During the filing of pleadings and after an investigation by the Petitioner, it paid by way of settlement to Jasper King the sum of $6,800.00, with no agreement from Respondent that Petitioner was legally liable under the law to make such payment, but with the agreement that the sum paid represented a fair figure of settlement, assuming that liability of the Petitioner existed.

It was, and is, conceded by the Petitioner that the original Plaintiff, Jasper King, a longshoreman, accepted and received benefits and medical payments in accordance with the provisions of the Longshoremen's and Harbor Workers' Act, supra.

Since the filing of the Petition, the second written decision of the United States Court of Appeals for the Third Circuit, sitting en banc, affirming the position of Respondent, has been reported in 272 F. 2d 823.

COUNTER STATEMENT OF THE QUESTIONS INVOLVED

I. Did the Supreme Court of the United States in its decision entitled *Crumady v. Joachim Hendrik Fisser* (1959), 358 U. S. 423, 79 S. Ct. 445, 3 L. Ed. 2d 413, overrule its prior decision in *Halcyon Lines v. Haenn Ship Ceiling and Refitting Corporation* (1952), 342 U. S. 282, 72 S. Ct. 277, 96 L. Ed. 318?

Answered NO by the majority opinion of the United States Court of Appeals for the Third Circuit.

II. Did the Supreme Court of the United States in its decision entitled *Crumady v. Joachim Hendrik Fisser* (1959), 358 U. S. 423, 79 S. Ct. 445, 3 L. Ed. 413, strike down the force and effect, absent a contractual warranty, of section 905 of the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A., §901 et seq.?

Answered NO by the majority opinion of the United States Court of Appeals for the Third Circuit.

III. Did the Supreme Court of the United States in its decision entitled *Crumady v. Joachim Hendrik Fisser* (1959), 358 U. S. 423, 79 S. Ct. 445, 3 L. Ed. 413, reject overrule or impair the force and effect of the reasoning of the United States Court of Appeals for the Third Circuit in *Brown v. American-Hawaiian Steamship Company* (3d Cir., 1954), 211 F. 2d 16, and *Crawford v. Pope & Talbot* (3d Cir., 1953), 206 F. 2d 784?

Answered NO by the majority opinion of the United States Court of Appeals for the Third Circuit.

IV. If any or all of the answers to the first three questions is or are YES, then the question is

> May a shipowner sued in a diversity civil action recover indemnity from an independent stevedoring contractor where neither the shipowner nor the ship are responsible for the discharge of the cargo at the port of discharge, are not responsible and do not pay for such discharging, are both strangers to the contract entered into by the stevedoring company, and neither are in privity of contract, either express or implied in fact?

Answered NO by the majority opinion of the United States Court of Appeals for the Third Circuit.

V. Where admittedly the stowage of the cargo by the ship was faulty, may a shipowner recover indemnity from a stevedoring company which went aboard the ship as a permittee of the ship operator and an invitee of the consignee as owner of the cargo, where the consignee, as owner of the cargo, on its own behalf and for its own benefit, made the agreement with the stevedoring company to discharge the cargo and to use special equipment and pier under the control of the cargo owner in such discharge.

Answered NO by the majority opinion of the United States Court of Appeals for the Third Circuit.

The above questions will be discussed seriatim.

ARGUMENT

QUESTION NO. I

The majority opinion of the United States Court of Appeals for the Third Circuit, 272 F. 2d 823, at p. 826, stated their conclusions with respect to the first question as follows:

> "Thus, the actual holding of the Crumady case seems to be that a contractual undertaking of the stevedore with the operator of a ship, who is not the owner, to unload in a safe and workmanlike manner inures to the ship. In contrast the case now before us affords no basis for finding or assuming that the operator of the ship had any dealing whatever with the stevedoring company which discharged the cargo. To the contrary, as already pointed out, the District Court indicated and counsel have represented that the carriage was on such terms and conditions that the consignee was responsible for the discharge of its own goods and arranged with the stevedoring company for the performance of that job. The shipowner and the stevedoring company were strangers. It necessarily follows that the alleged duty upon which the present claim rests can only be an imposition on a wrongdoer in invitum. It is a question of tort liability, rather than one of contract or warranty, whether either wrongdoer must share the burden of a recovery by the injured party against the other wrongdoer. In reality we have here a problem of contribution between tortfeasors and not one of indemnification for breach of warranty. And the Supreme Court has clearly ruled that in these stevedore injury cases the shipowner may not require contribution from the stevedoring company. Halcyon Lines v. Haenn Ship Ceiling and Refitting Corp., 1952, 342, 72 S. Ct. 277, 96 L. Ed. 318."

Justice Black, speaking for the Supreme Court of the United States in *Halcyon Lines v. Haenn Ship Ceiling and Refitting Corporation* (1952), 342 U. S. 282, at page 285 stated (footnotes omitted):

> "In the absence of legislation, courts exercising a common-law jurisdiction have generally held that they cannot on their own initiative create an enforceable right of contribution as between joint tortfeasors. This judicial attitude has provoked protest on the ground that it is inequitable to compel one tortfeasor to bear the entire burden of a loss which has been caused in part by the negligence of someone else. Others have defended the policy of common-law courts in refusing to fashion rules of contribution. To some extent courts exercising jurisdiction in maritime affairs have felt freer than common-law courts in fashioning rules, and we would feel free to do so here if wholly convinced that it would best serve the ends of justice.
>
> "We have concluded that it would be unwise to attempt to fashion new judicial rules of contribution and that the solution of this problem should await congressional action. Congress has already enacted much legislation in the area of maritime personal injuries. For example, under the Harbor Workers' Act Congress has made fault unimportant in determining the employer's responsibility to his employee; Congress has made further inroads on traditional court law by abolition of the defenses of contributory negligence and assumption of risk and by the creation of a statutory schedule of compensation. The Harbor Workers' Act in turn must be integrated with other acts such as the Jones Act (41 Stat 1007, 46 USC §688), the Public Vessels Act (43 Stat 1112, 46 USC §§781-790), the Limited Liability Act (RS §4281, as amended, 46 USC §§181 et seq.) and the Harter Act (27 Stat 445, 46 USC §§190-195). Many groups of

persons with varying interests are vitally concerned with the proper functioning and administration of all these Acts as an integrated whole. We think that legislative consideration and action can best bring about a fair accommodation of the diverse but related interests of these groups. The legislative process is peculiarly adapted to determine which of the many possible solutions to this problem would be most beneficial in the long run. A legislative inquiry might show that neither carriers, shippers, employees, nor casualty insurance companies desire such a change to be made. The record before us is silent as to the wishes of employees, carriers, and shippers; it only shows that the Halcyon Line is in favor of such a change in order to relieve itself of a part of its burden in this particular lawsuit. Apparently insurance companies are opposed to such a change. Should a legislative inquiry convince Congress that a right to contribution among joint tortfeasors is desirable, there would still be much doubt as to whether application of the rule or the amount of contribution should be limited by the Harbor Workers' Act, or should be based on an equal division of damages, or should be relatively apportioned in accordance with the degree of fault of the parties.

"In view of the foregoing, and because Congress while acting in the field has stopped short of approving the rule of contribution here urged, we think it would be inappropriate for us to do so."

With respect to the holding in the *Crumady* decision, supra, it should be pointed out that the majority opinion of the Supreme Court makes it clear and it so stated that its decision was based upon *Ryan Stevedoring Co., Inc., v. Pan-Atlantic Steamship Corporation* (1956), 350 U. S. 124, 76 S. Ct. 232, 100 L. Ed. 133. Justice Douglas, speaking for the majority of this court in the *Crumady* case, stated:

"We think this case is governed by the principle announced in the Ryan case", 358 U. S. 423, 428, 3 L. Ed. 2d, 413, 417.

The *Ryan* case did not hold that an operator of a ship, the owner of a ship, the charterer of a ship, the agent of a ship, or the ship itself could recover indemnity on the basis of a tort or in disregard of the exclusionary effect of the Harbor Workers' Act, upon the right of action of a shipowner under comparable circumstances without reliance upon an indemnity or service agreement of a stevedoring contractor.

The Supreme Court in the *Ryan* case points clearly to the effect that the shipowner's responsibility is based upon a breach of warranty, 350 U. S. 124, 132. The Court specifically stated that the steamship owner in that case "relies entirely upon petitioner's [Ryan Stevedoring Company] contractual obligation," and "we [the Supreme Court of the United States] do not meet the question of a non-contractual right of indemnity or of the relation of the Compensation Act to such a right."

The majority opinion further stated:

"The ship owner's claim here also is not a claim for contribution from a joint tortfeasor. Consequently, the considerations which led us to the decision in *Halcyon Lines v. Haenn Ship Ceiling & Refitt ng Corp.*, 342 U. S. 282, 96 L. Ed. 318, 72 S. Ct. 277, are not applicable."

The force and effect to be given to this statement of the majority opinion of the Supreme Court in the *Ryan* case is best pointed up by the dissenting opinion written by Mr. Justice Black, in which he was joined by the Chief Justice, Mr. Justice Douglas and Mr. Justice Clark. It will be observed upon a cursory examination of the *Ryan* case that that decision was not based upon the absence of the contractual obligation and was not based upon a ruling to strike down the force and effect of the Harbor Workers' Act, absent a contractual warranty implied by law.

It would appear to be clear that where the Supreme Court in the majority opinion of the *Ryan* case expressly stated that its decision was not based upon absence of contract and that it did not reach the exclusionary effect of the Compensation Act, that such was its reasoning. Therefore, when this Court subsequently, as it did in the *Crumady* case, stated that such subsequent decision was based upon the *Ryan* case, it does not seem logical, warranted or necessary to place a meaning upon such later decision as suggested by the Petitioner and the dissenting opinions of the Judges of Court of Appeals in this case.

QUESTION NO. II

Section 5 of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1426, 33 U. S. C. A., §905, provides:

> "Sec. 905. Exclusiveness of Liability. The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment nor that the injury was due to the contributory negligence of the employee."

The majority opinion of the Third Circuit with respect to the effect of the *Crumady* decision on the above statute, declared at page 826:

> "We find no indication that the Supreme Court in the Crumady case intended to abrogate or disregard the distinction between a permitted recovery-over based on contract and a prohibited misuse of the concept of indemnity to obtain contribution from a tortfeasor who enjoys the protection of the Longshoremen's and Harbor Workers' Act. We cannot square a recovery in this case with adherence to that distinction."

QUESTION No. III

With respect to this question, the majority opinion of the Third Circuit stated (footnote omitted):

> "How this case might have stood had the stevedoring company been employed by the owner or operator of the ship to unload the cargo in question we need not and do not decide. For appellant neither alleged in its third-party complaint nor sought to prove any contractual relation or undertaking as the basis of the alleged liability. Rather, as an affirmative defense, appellee in its answer asserted that there was no contract between these parties. The correctness of this allegation was stipulated at trial. Whatever arrangement was made for unloading the cargo, the shipowner was not party to it and on the present record claims no standing under it.
>
> "The District Court ruled that in such a situation as this the absence of a contractual relation between the parties is fatal to the indemnity claim. We have said as much in Brown v. American-Hawaiian S.S. Co., 3 Cir., 1954, 211 F. 2d 16, 18 and Crawford v. Pope & Talbot, Inc., 3 Cir., 1953, 206 F. 2d 784, 792. Any obligation of a stevedoring company to indemnify a

shipowner for shipboard injury of its employees in the course of their employment must be bottomed on a promise, express or implied in fact, of the stevedoring company. Otherwise, tort liability would be imposed upon the stevedoring company for negligent injury of its employee, a result prohibited by the Longshoremen's and Harbor Workers' Act, 33 U.S.C.A. Sec. 901 et seq. However, it is strongly urged that the Supreme Court in Crumady v. The Joachim Hendrik Fisser, 358 U. S. 423, 79 S. Ct. 445, 3 L. Ed. 2d 413, has rejected the reasoning and impaired the authority of the Brown and Crawford cases."

In *Brown v. American-Hawaiian Steamship Corporation* (3d Cir., 1954), 211 F. 2d 16, 18, the Court declared (footnotes omitted):

"There is, however, one aspect of the present appeal which requires further refinement. Appellant suggests that irrespective of the contractual relations between third-party plaintiff (owner) and third-party defendant (employer) in this type of suit, a right of indemnity exists where the liability of the former is secondary or passive while that of the latter is primary or active. Such a problem would be posed, for example, where the owner is held liable to a plaintiff-employe for a condition of unseaworthiness created by the employer's negligence and there is no contract, express or implied, between them, or, if such contract exists, it cannot be read to lay the groundwork for an indemnification claim. In answer to this suggestion we repeat what we thought had been made clear by the Crawford case: there can be no action of indemnity in these cases which is not based on the violation of some contractual duty. Were the rule otherwise the employer could be made to respond indirectly in tort for damages for which he would not be answerable under the Longshoremen's and Harbor Workers' Act.

> Such a rule would be violative of Section 5 of the Act as well as of the spirit of the entire statute whereunder an employer's duty to pay compensation to his injured employees without regard to negligence is substituted for his common law tort liability. Cf. Pope & Talbot, Inc. v. Hawn, 346 U. S. 406, 412, 74 S. Ct. 202."

In Note 6 to the *Ryan* case, supra, page 132, the Supreme Court wrote:

> "6. We do not reach the issue of the exclusionary effect of the Compensation Act upon a right of action of a shipowner under comparable circumstances without reliance upon an indemnity or service agreement of a stevedoring contractor. See Brown v. American-Hawaiian S.S. Co. (CA 3d Pa.) 211 F. 2d 16, 18; . . ."

That Court had previously, in *Crawford v. Pope & Talbot* (1953), 206 F. 2d 784, declared the same principle and the Supreme Court of the United States affirmed the same principle in *Pope & Talbot v. Hawn* (1953), 346 U. S. 406, 98 L. Ed. 143, 74 S. Ct. 202. See also page 146 of Mr. Justice Black's dissenting opinion in the *Ryan* case.

QUESTION No. IV

What has heretofore been said with respect to Questions I, II and III, and particularly with respect to Question III, is complete and adequate rejection of Question IV. It may also be appropriate that the dissenting opinion in *Crumady v. Joachim Hendrik Fisser*, supra, written by Mr. Justice Harlan and concurred in by Mr. Justice Frankfurter and Mr. Justice Whittaker be called to this Court's attention.

Mr. Justice Harlan indicated in the dissenting opinion that the opinion of this Court in *Weyerhaeuser Steam-*

ship Company v. Nacirema Operating Company (1958), 355 U. S. 563, 568, 2 L. Ed. 2d 491, 78 S. Ct. 438, was applicable to the *Crumady* case. It is clear that the reasoning of the majority opinion of the Court of Appeals for the Third Circuit believed that the reasoning in the *Weyerhaeuser* case is also applicable to the instant case. See also opinion of the Court of Appeals for the Third Circuit in *Hagans v. Farrell Lines* (1956), 237 F. 2d 477.

QUESTION NO. V

Even should this Court believe that Questions I, II, III and IV do not bar the ship owner from a recovery from the Stevedoring Company in this case, the ship owner is barred from recovery because of the fault on its own part in the improper stowage of the cargo.

The majority opinion of the Court of Appeals in this case stated:

> "However, appellant claims indemnity from the stevedoring company on the theory that primary responsibility for the accident and an obligation to indemnify the shipowner should be imposed on the appellee because the immediate cause of the accident was appellee's negligence in unloading the cargo, improper though the stowage admittedly was."

The Petitioner alleged that it had improperly stowed the cargo. It conceded that such improper stowage caused the vessel to be unseaworthy. It is urged that the language of this Court, even as late as 1958, is applicable. The language is:

> "Sound judicial administration requires us [the Supreme Court] to point out that in the area of contractual indemnity an application of theories of active or passive, as well as primary or secondary negligence is inappropriate."

[Close of the opinion of this Court in *Weyerhaeuser v. Nacirena*, supra.]

It will be also noted that in the *Weyerhaeuser* case, this Court, without dissent, declared that conduct on the part of the ship or its operator could preclude recovery, 355 U. S. 563, 567.

Reverting to the opinion of this Court in the *Halcyon* case, supra, it was pointed out forcibly and correctly that the matter of whether or not a joint tortfeasor in this class of cases, absent contractual relationship, should be entitled to recover against a mutual wrongdoer should be left to the Congress. Since the decision in the *Halcyon* case, the Congress of the United States has amended the subject Act in many important matters, including additional benefits and additional rights of the injured parties to sue. The Congress of the United States has not deemed it appropriate to change the decision in this court in the *Halcyon* case. It has not deemed it appropriate to change the exclusionary section of the Act. It therefore appears that the reasoning in the *Halcyon* case should apply in this case and this Court should not now undertake legislation which it refused to undertake just a few years ago in the *Halcyon* decision.

It is not believed by the Respondent that this Court in the *Crumady* case intended to go as far as suggested by the dissenting opinions of Chief Judge Biggs and as urged by the Petitioner.

Nor is it believed correct, as suggested by Judge Goodrich, that the *Crumady* case eliminated the necessity of a contract between the ship owner, its operator and the stevedore. It is not believed that the Supreme Court is now legislating in a direction contrary to the *Halcyon* decision, wherein, as heretofore stated, such legislation is for the Congress and not for this Court.

The statement in the majority opinion in the *Crumady* case about third party beneficiaries is not applicable to the instant case. The reason for this conclusion is obvious. In

the *Crumady* case there was a stevedoring contract. The contract was a part of the record. It provided, among other things, the following:

> "This agreement, made and entered into this 30th day of December, 1953, between Insular Navigation Company as Owner, Operator, Charterer or Agent, and Nacirema Operating Co., Inc., Contractor, will govern the discharging and/or loading of vessels owned, operated or otherwise controlled by Insular Navigation Company at the Port of Port Newark, New Jersey, effective December 30, 1953, and the Contractor undertakes to faithfully furnish such stevedoring services as may be required upon such vessels as are assigned to the Contractor at the agreed rates, terms, and conditions specified below:
>
> Discharging
>
> 385,000 Board Feet Nicaraguan Pine from m. v. 'Joachaim Hendrik Fisser' scheduled to arrive Port Newark January 2."

The agreement was signed as follows:

> "Insular Navigation Co., Owner/Operator/Charterer/Agent, By: J. J. Smith
>
> Nacirema Operating Co., Inc., Contractor by Andrew G. Dantzler, Vice Pres."

Transcript of Record in the Supreme Court, 96-103.

There was no reasonable necessity for the majority opinion in *Crumady* case to write such a statement. It was and is dicta and did not belong in the case.

Ships are operated and managed through owners, operators, agents or charterers. Such is the only way that a ship may contract. The ship itself is not capable of execut-

ing an agreement or preparing or reviewing any of the terms thereof. The contract in the *Crumady* case expressly named the steamship JOACHIM HENDRIK FISSER and stated the date when the ship was scheduled to arrive in the Port of Newark. The contract, therefore, was clearly between the owner, operator, charterer or agent and the stevedoring company. The owner of the ship was expressly made a party to the contract and inasmuch as the majority opinion, as indicated above, declared that its decision was based upon the principle of the *Ryan* case which does not enunciate with respect to third party beneficiaries, such a statement by the majority opinion was not only dicta but caused, and will continue to cause, confusion and delay in the disposition of many cases in the many federal courts throughout the United States and will encourage and invite many additional suits. This Court should lay to rest the misinterpretation by the dissenting Judges in this case by denying the Petition for Certiorari.

This Court should leave the majority opinion of the United States Court of Appeals for the Third Circuit stand.

It is respectfully submitted that this Court should not legislate in a matter where Congress has previously legislated and where it would vitally affect what has been considered by many of the foremost thinkers of this country to be the greatest secondary national defense to this country, namely, shipping and those counterparts of economics, transportation, facilities, unions and parties connected therewith.

It was, and is, conceded that the development of our American Merchant Marine during World War I and following World War I convinced our American citizenry, and particularly those in charge of our national defense, of the importance of the shipping industry and those parties directly connected with and affected thereby. Many textbooks may be referred to in connection with the legislation of the Congress in re The Harter Act, the Carriage of Goods by Sea Act, Exoneration and Limitation Proceedings,

the Ship-Vessels Act, the Longshoremen's and Harbor Workers' Act, the Jones Act, etc, which indicates clearly that Congress has been, and is, giving consideration respecting legislation in re the shipping industry in the United States. In the legislative action which this Court is now urged to take the thoughts of the Director of the Merchant Marine of the United States of America are not made known to the parties to this proceeding; the ship owners themselves have not been heard nor are they being permitted to be heard; the underwriters issuing policies covering protection and indemnity insurance to the ship in connection with personal injury claims are not being consulted, nor are their views made known; the views of the casualty companies covering the public liability of stevedores is not known; the attitudes of those carrying longshoremen's compensation insurance have not been heard; the stevedore companies have not been heard; the welfare of the various maritime ports throughout the United States has not been discussed or determined; the overlapping of the insurance coverage with respect to personal injuries of persons aboard ship and that of the casualty companies for public liability of the stevedore has not been adequately placed on this record; the various interests affected by the urged legislation have not been heard; no adequate hearing as to the effect upon Merchant Marine, not only as a private industry but as a secondary national defense, has been conducted, nor has the public, which has an interest in this worldwide matter, been heard; the Department of Commerce has not been heard; the right of freedom of commercial contracts, particularly where the entire vessel is chartered, absent national emergency, is in jeopardy.

This Court in the *Ferncliff Case* (1939), 306 U. S. 444, at 448, 1939 A. M. C. 403, at 407, approved the following language:

> "The general policy of our law is freedom of contract subject only to the statute and considerations of public

interest. Where a contract stipulation is not clearly opposed to public policy it should be upheld as it is the agreement of the parties."

With utmost respect to the majority opinion in the *Crumady* case, it must be concluded that the provisions of the stevedore contract as being made "between Insular Navigation Company as owner, operator, charterer or agent . . . and the stevedoring company" governing the discharge of the *SS. Joachim Hendrik Fisser* scheduled to arrive at the Port of Newark on January 2, 1954, [Transcript of the Record in the *Crumady* case in the Supreme Court, 96-103] cannot be read other than a contract with the owner, operator, charterer or agent of the ship. It does not do justice to judicial reasoning or to judicial administrative justice to state in an opinion that the ship or its owner came within the zone of modern law of third party beneficiary by judicial fiat, whereas in fact the "owner", the "operator", the "charterer" and the "agent" of the ship were expressly named as parties to the stevedore agreement and the ship was expressly named as one of the ships governed by the agreement.

It is earnestly and respectfully urged that the administration of judicial justice requires the forthwith denial of the petition for certiorari and the memorandum denying said certiorari should state that the decision in *Crumady* did not, and was not, intended to overrule the *Halcyon Lines* case or override Section 905 of the Longshoremen's and Harbor Workers' Compensation Act and was not intended and does not impair the reasoning in *Brown v. American-Hawaiian*, supra, and *Crawford v. Pope and Talbot*, supra. The only possible reason for this Court to grant a certiorari would be so that this Court could in a full opinion lay to rest the suggested reasoning of the Petitioner and that of the dissenting Judges in this case. This Court has the power and duty in denying a petition for certiorari to make a judicial administrative statement in aid of justice and, in

order to avoid further unnecessary congestion of the dockets of the federal courts, to state unequivocally that the reasoning of the Petitioner and the dissenting Judges does not and should not flow or stem from the result of the majority of the opinion of the Court in the *Crumady* case. To hold as a general principle in this class of cases as it is urged that the *Crumady* case did hold that a ship, shipowner, charterer or subcharterer may recover ipso facto on the theory that it is a third party "beneficiary" is not only factually but legally unsound. For instance, there are many types and forms of charter parties: (1) pro hac vice; (2) time charters; (3) voyage charters; (4) agents' ship chartering operators; (5) many other and varied forms. All such charter parties may, and some do, contain different clauses in relation to the length of time in which a vessel has to discharge the cargo or the length of time the consignee has to discharge the cargo and, in the absence of discharging cargo in the specified time, "lay days" elapse and demurrage at a specified rate of thousands of dollars per day begin to accrue to the vessel. There may be certain provisions in the charter party with respect to exoneration, limitation of liability, Carriage of Goods by Sea Act and, where the charter party is for the complete and entire ship, the Courts have sustained the validity of the provisions of the charter party as between the parties which are not against public policy. There may be and are express provisions in contracts holding the ship harmless and there may be express provisions by the ship holding the cargo harmless as well as the stevedoring company. This would and could relate to damage to the ship and/or damage to the cargo and also to damage to property and to personal injuries of third parties. For a third party beneficiary, such as the petitioner urges, to have the benefit of such a contract, then such third party beneficiary should have mutual responsibilities to the promisor or maker of such contract in any respect from which the promisor or maker of the contract is damaged or hurt. Suppose, for instance, the ship did not arrive on time

or was delayed by reason of going to another port for reasons peculiar to itself, and a stevedoring company appeared with 54 employees for several days to begin the discharge of said ship. It is believed that the stevedoring contractor could recover its loss from the ship or its operator, absent a contract with it.

There are too many variables to apply the simple statement of the words "third party beneficiaries". Therefore any ship may recover indemnity in this class of cases from any stevedore regardless of the existence or non-existence of a contractual relationship between them.

It is submitted that the Petition for Certiorari should be forthwith denied.

Respectfully Submitted

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